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LABOR & EMPLOYMENT

ALERT

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DEPARTMENT OF LABOR SEEKS TO PUT NEW FLSA REGULATIONS FOR HOMECARE WORKERS BACK ON TRACK

By M. Christine Carty and Alizah Z. Diamond

Last week marked a new battle in the war the U.S. Department of Labor (DOL) has waged against the homecare industry. Appealing two federal court rulings that invalidated new regulations extending minimum wage, overtime and travel time pay to thousands of domestic workers in the homecare industry, the DOL argued that a U.S. Supreme Court decision in 2007 effectively endorsed the DOL's authority to change the FLSA regulations, that the homecare industry lacked standing to challenge the new "companionship" regulations, and that the new companionship regulations are a reasonable exercise of its "broad general authority" to issue regulations. If successful, the DOL's appeal would leave the homecare industry with no judicial remedy, other than the U.S. Supreme Court, to challenge these regulations on their merits.

The Regulations

At issue in the DOL's appeal are final regulations that would significantly narrow the exemptions under the FLSA for "companionship" and "live-in" domestic service workers. Historically, the FLSA has expressly exempted from its coverage (i) "any employee employed in domestic service employment to provide **companionship services** for individuals who (because of age or infirmity) are unable to care for themselves," 29 U.S.C. §213(a)(15), and (ii) "any employee who is employed in domestic service in a household and **who resides in such household**." *Id*. at (b)(21) (only for overtime). Generally, workers fall within one of these exemptions if they satisfy a "duties test." Since 1975, homecare agencies that employed qualifying domestic service workers were expressly able to take advantage of these two exemptions.

The DOL's final regulations, which were scheduled to go into effect on January 1, 2015, would have considerably altered this landscape by, among other things:

- Prohibiting homecare agencies from claiming either exemption, even if the homecare worker is jointly employed by an agency and an individual, family, or household using the worker's services. Rather, only the individual recipient of the services could continue to claim an exemption for such workers, providing they satisfy all other applicable criteria; and
- Limiting the definition of "companionship services" to providing "fellowship," "protection" and less than 20 percent of "care" services out of the total hours in a work week. The 20 percent limitation is

new. Provision of "fellowship" services generally means engaging the recipient in social, physical and mental activities. "Protection" generally means being present and monitoring the safety and well-being of a person who cannot care for his or her needs. "Care" services include daily activities such as dressing, bathing, feeding, meal preparation and light housework, among others, in conjunction with fellowship/protection. If the 20 percent ceiling of "care" services is exceeded, the "companionship services" exemption does not apply, and FLSA minimum wage, overtime and travel time requirements must be followed.

- Imposing record keeping requirements on employers of home care workers.

These regulations, if implemented, will subject many homecare agencies and individual domestic service employers to record keeping requirements and liability for federal minimum wage, overtime and travel time payments for workers who previously were exempt under the FLSA, unless they can separately demonstrate that there is no "employment relationship" with the worker under general FLSA standards. This will be difficult since the statute broadly defines "to employ" as meaning, "to suffer or permit to work" and the determination of whether an employment relationship exists focuses on the extent to which the worker is economically dependent on the employer (as opposed to independent contractors who are in business for themselves). This test is often referred to as the "economic realities" test.

The D.C. District Court Vacates the Regulations

The implementation of the DOL regulations came to an abrupt halt on December 22, 2014, when the U.S. District Court for the District of Columbia issued an order vacating the portion of the new regulations that denied third-party employers, like homecare agencies, the ability to claim the "companionship" and "live-in" exemptions. The ruling was issued in the case of *Home Care Ass'n of Am. v. Weil*, Civil Case No. 1:14-cv-00967 (RJL) (D.D.C. June 2014), in which the plaintiffs, Home Care Association of America, International Franchise Association and National Association for Home Care & Hospice, alleged, among other things, that the DOL exceeded its statutory authority in issuing the new FLSA regulations.

In a pointed decision, the Court ruled that the DOL had exceeded its authority in removing the ability of third-party entities to take advantage of the "companionship services" and "live-in" domestic services exemptions, noting that the statutory language supporting the use of the exemptions by third-parties had been in place since 1974 and specifically was upheld by the U.S. Supreme Court. Further, the Court noted that, despite "efforts by legislators in the majority party in both the House and the Senate in three consecutive Congresses" to change the law, no legislation excluding third-party employers from utilizing the exemptions had ever been passed. Accordingly, the Court rejected the DOL's attempt to substantively change the existing regulation. The Court was direct: "[U]ndaunted by the Supreme Court's decision … and the utter lack of Congressional support to withdraw the exemption, the Department of Labor amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress."

Subsequently, on January 14, 2015, the Court granted plaintiffs' motion for emergency injunctive relief and issued a second ruling vacating the DOL's proposed narrow definition of "companionship services" under the new regulations. Once again, the Court found that the DOL had overstepped its authority by trying to unilaterally change a long-standing regulation through the administrative process, where Congress had shown no indication that it intended to impose a "20-percent limit" on "care"-giving services to elderly and disabled individuals:

> Home care workers have been providing care to the elderly and disabled, under the umbrella of the companionship services exemption, since the enactment of the 1974 amendments. Here, I am once again

> faced with a long-standing regulation left untouched by Congress for 40 years … Congress has not shown one iota of interest in cabining the definition of companionship services which has been interpreted by the Department in the same way for 40 years …

As a result of the District Court's rulings, the DOL's regulations, as they apply to third-party employers of homecare workers and the companionship services exemption, have not gone into effect.

DOL Appeal to D.C. Court of Appeals

The DOL appealed both of the D.C. District Court's rulings to the U.S. Court of Appeals for the District of Columbia Circuit. The issues presented by the DOL for review to the Court of Appeals were "[w]hether the companionship-services regulation, 29 C.F.R. §552.6, and third-party employment regulation, 29 C.F.R. §552.109, are permissible exercises of the rulemaking authority that Congress delegated to the Department of Labor in the Fair Labor Standards Act."

In its brief filed on February 20, the DOL forcefully argued that the U.S. Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, *551 U.S. 158 (2007)*, settled the question of the DOL's authority to include or exclude third-party employers from the FLSA homecare regulations in the DOL's favor. The DOL argued: "It was not open to the district court to hold that the FLSA's text resolves the question of third-party employment. The Supreme Court held that the FLSA's text does *not* answer that question, which is a matter for the agency to decide based on considerations of policy." As a result, the DOL argued that the new regulations that require third-party employers of homecare workers to pay minimum wage, overtime and travel time should not have been invalidated by the U.S. District Court. The DOL also contends that, since the third-party employer regulations are valid, the homecare industry plaintiffs do not have standing to challenge the revised definition of "companionship services" because they are prohibited by the new regulation from claiming the companionship exemption. Further, the DOL argued that, even if the homecare industry plaintiffs have standing, the revised definition is "a reasonable exercise of the [DOL's] express authority to define and delimit that term."

Conclusion

The industry plaintiffs' brief and a DOL reply will be filed before April 23, 2015, with a decision expected by June 2015. In the meantime, all provisions in the DOL's Final Rule not expressly vacated by the D.C. District Court remain in effect, including the new recordkeeping requirements for employers of homecare workers.◆

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